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COMMON LAW LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE. — Fundamental in the law governing the liability of a municipal corporation to civil actions by individual citizens is the recognition of the double character which such a corporation assumes. In one aspect, it stands as the representative of the sovereign, charged with certain governmental, legislative and judicial, or discretionary, powers and duties; in the other, it is regarded as being similar to a private corporation, with duties purely ministerial, corporate, or private, with powers granted for the special emolument or benefit of the municipality. *Bailey v. Mayor, etc., of New York*, 3 Hill (N. Y.) 531, 539. The rule is settled that in the former capacity the corporation is liable in civil suits for damages resulting from the negligence of its agents only where a statute imposes such liability. In the latter capacity, it is ordinarily liable impliedly or at common law, as would be a private person. See 2 THOMP., NEG., 1st ed., 731. The reason given for the exemption in the first class is that the corporation as an agent of the sovereign should possess the immunity of the sovereign from liability unless it consents to submit to that liability. *O'Connor v. Pittsburgh*, 18 Pa. St. 187. The main difficulty arises in determining within which class of duties a given act falls, and upon this point the authorities have not taken altogether consistent positions.

In a late Maryland case a municipal corporation acting within its charter powers had passed an ordinance prohibiting fast bicycle riding on the streets. Through negligent failure to enforce the ordinance it became a dead letter, the nuisance continued, and the plaintiff was injured in consequence. The court held the city liable on the ground that its duty had not been discharged by the mere passing of the ordinance, but that it must use due care in the enforcement thereof. *Mayor, etc., of Hagerstown v. Klotz*, 49 Atl. Rep. 836. This decision is contrary to the great mass of authority, which holds that the passing and enforcing of ordinances are among the governmental or discretionary powers of a municipal corporation; and that for the failure to pass ordinances, or for the negligence of its police officers in enforcing them after they are passed, the city shall not be liable. *Jones v. Williamsburgh*, 97 Va. 722.

On the other hand, in a similar class of cases, viz., those respecting the duty of repairing defects in highways, the weight of American authority outside of the New England states classifies the duty as a corporate duty, and consequently makes the municipal corporation proper — as distinct from counties, townships, etc. — liable for injuries resulting from negligent failure to repair. See DILL., MUN. CORP., 4th ed., § 1017. The English rule is contrary to this. *Gibson v. Mayor of Preston*, L. R. 5 Q. B. 218, 221. One court in speaking of the two classes of cases says: "The condition of the street or walk . . . is one thing and the manner of its use by the public is quite a different thing." *Jones v. Williamsburgh*, *supra*. But it is difficult to see why the repairing of a street used by the public is not as much a public duty as the enforcement of an ordinance regulating the use of the same street; or why the removal of an inanimate obstruction in the highway should be a corporate duty, while the removal of a bicycle "scorcher" should be a governmental duty.

If we regard the fundamental principle of the twofold nature of municipal corporations as sound, the repairing of highways would be, as a matter of reason, very near the dividing line between the corporate and the governmental duties, if not actually among the latter. If the implied

liability is to exist in this class of cases, — a result which would seem to be desirable, — such liability must be regarded as an exception to the rule and justified on grounds of policy. It seems impossible, however, to doubt that the enforcement of ordinances falls on the side of governmental functions, and for negligence in this respect there should be no liability at common law.

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DEFENCES OF ESTOPPEL AND CONTRIBUTORY NEGLIGENCE AGAINST SOVEREIGNS. — A legal question upon which a dearth of direct authority exists is suggested by two recent cases. One was an action to enjoin the collection of taxes assessed upon the plaintiff's land. In answer to the defence that no taxes had been paid the plaintiff relied upon an alleged estoppel, but the court held that an estoppel *in pais* could not be raised against the city acting in its governmental capacity. *Philadelphia Mortgage, etc., Co. v. Omaha*, 88 N. W. Rep. 523 (Neb.). In the other case a suit was brought by a township trustee for negligently setting fire to a roadway. The court in a *dictum* said that as the township was only a political subdivision of the state it was not subject to the defence of contributory negligence. *Pittsburg, etc., R. R. v. Iddings*, 62 N. E. Rep. 112 (Ind., App. Ct.).

The doctrine that the defences of contributory negligence and estoppel cannot be set up against a sovereign seems impossible to support upon any legal principle. It is of course universally conceded that no court of its own right may presume to judge between sovereign and subject. It seems clear, however, that the voluntary appearance of a sovereign before a tribunal of justice is a signification of its desire that the issue in question be decided according to the rules of justice administered by that tribunal. The defences of contributory negligence and estoppel are as deeply rooted in the courts' conception of justice as the defences of payment to an action on a bond or waiver to an action on a contract. To say that these defences cannot be set up in an action by or against a sovereign where jurisdiction has once been obtained, is to maintain either that standards of justice vary with the identity of the litigants, or that the state in consenting to the adjudication of the court impliedly stipulates that certain established principles of that tribunal shall not be applied to its disadvantage. Neither position is tenable.

In the negligence case the rule that the state is not liable for the negligent acts of its agents was relied upon to support the conclusion that their contributory negligence could not be set up in an action by the state. Such a conclusion, however, is founded upon a misconception of the basis of the non-liability of the state for the negligence of its agents. That immunity does not rest upon the ground that the acts of the agents are not the acts of the state, but is based upon the principle that the state is not amenable to the courts for its acts. There are certain legal analogies that seem to be in point and tend to a conclusion different from that reached by the courts in the cases under discussion. The ordinary rules of practice are not dispensed with by the fact that one of the parties to the action is a sovereign. *King of Spain v. Hullet*, 1 Cl. & Fin. 333. And in a suit for ejectment by a sovereign the defence of a waiver of conditions may be set up if the acts of the sovereign's agents would ordinarily constitute a waiver. *Davenport v. The Queen*, 3 App. Cas. 115. In this